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Supreme Court of the United States

OCTOBER TERM, 1945

H. SMITH RICHARDSON
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The undersigned, on behalf of H. Smith Richardson, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 196) is reported in 151 F. (2d) 102. The opinion was written by a judge who did not concur in the judgment on the two issues which are presented by this petition. The opinion of the single judge of the Tax Court (R. 43) is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 17, 1945. (R. 205.) A petition for rehearing was duly filed, and was denied on September 25, 1945. (R. 212.) The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

I

1. Whether the judge of the Tax Court applied the proper standard of law in determining the value of closely held stock for federal gift tax purposes, when there had been no sale of the stock, and no weight was in fact given in determining the value to any other factor than the value of the assets owned by the corporation in question.

II

2. Whether the failure to exercise in 1932 through 1935 a power to take the corpus of a trust fund *established by another person* constituted gifts by the petitioner of the income from the corpus within the proper construction of § 501(a) of the Revenue Act of 1932.

3. Whether failure to exercise such a donated power was a release of the power with respect to the income, within § 452(c) of the Revenue Act of 1942, as amended, which provides that "A release of a power to appoint before July 1, 1946, shall not be deemed a transfer of property by the individual possessing such power."

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 18-25.

Statement

The facts involved may be summarized as follows:

I

On December 20, 1935, the petitioner created five trusts, one for each of his five children. (R. 19-20; 43-44.) He transferred to these trusts 5,100 shares of stock in Piedmont Financial Company, Inc. (R. 20, 44.) The first question raised involves the value to be fixed for this Piedmont stock.[1] The stock had never been listed on any market. (R. 49, 60.)

The Commissioner fixed a value of $95.509 for each Piedmont share. (R. 12.) This was apparently derived by taking the value of all of Piedmont's assets, or $9,808,599.27 (R. 24), and deducting an amount of $257,699.27 for taxes and expenses, leaving a net calculated value for the assets of Piedmont of $9,550,900. Dividing this by 100,000, the number of shares outstanding, gives a value of $95.509 for each share.

The petitioner contended that the value of the stock was not more than $53.44 per share. In support of this position, the petitioner called three expert witnesses, who developed the factors and bases which they took into account in arriving at a valuation for the stock, in terms of the price which would be paid for the stock by a willing buyer to a willing seller, and other relevant factors. The judge

[1] In the court below, a question was also raised as to the valuation of a large block of stock in Vick Chemical, Inc., which was given to the same trusts. This question is not presented in the present petition. This is because this Court has recently denied a petition by the Government raising the same issue (*United States* v. *Havemeyer*, No. 388, October Term, 1945), and because the court below in its opinion regarded the issue as turning on "deficiencies in the proofs." (R. 199.) We think that this view is wholly unsupported by the record, but we recognize that the question whether it is, or not, is not one which this Court should be asked to review.

of the Tax Court, however, disregarded all of this evidence. The standard which he applied in valuing the stock appears from his statement that the Piedmont stock "can only be valued in any real or practical way by primarily considering the value of the securities owned by the corporation. Any other approach would, in our opinion, be futile." (R. 61.) On this basis, he determined that the value of the Piedmont stock was "not less than $95.509 per share." (R. 54.)

The Circuit Court of Appeals affirmed this decision. The judge who wrote the opinion felt "substantial doubt" (R. 201) as to whether the proper standard had been applied, and favored a remand of the case to the Tax Court. The majority of the court, however, without any discussion at all, affirmed the decision below. (R. 202.)

II

The other issue has no relation to the valuation question.

In 1932, Grace Jones Richardson, the petitioner's wife, created five trusts, one for each of her five children. (R. 20-21, 25-32.) Article *Eleventh* of each of these trusts gave the petitioner power to terminate the trust and take the principal or corpus for his own benefit. The five trusts were in existence in 1935, and no exercise of any power of the petitioner to terminate the trusts or take the corpus had been made. (R. 21.)

The respondent, by an amended answer (R. 14-16), raised for the first time the contention that the petitioner had made a gift of the accumulated income of these trusts in each of the years from 1932 through 1935, by reason of his failure to exercise the power to take the corpus. No testimony was offered by the respondent on this issue. It was, however, stipulated that the trusts were created, and that none of the trusts had been in any respect modified, altered or revoked, prior to December 30, 1941. (R. 21.)

It was also stipulated that the trusts "are the same trusts as those involved in a proceeding before the Court wherein H. Smith Richardson, the present petitioner, was the petitioner, which proceeding is reported at 42 B.T.A. 830." (R. 21.)

The judge of the Tax Court held that the annual accumulation of the income in these trusts constituted a taxable gift by the petitioner for the year 1935, and in previous years. The Circuit Court of Appeals affirmed this decision. The judge who wrote the opinion said that he was "at a loss to understand how these accumulations of income set aside for the beneficiaries in the years 1933-1935 can constitute a completed gift by the petitioner accomplished in 1935, or indeed in any earlier year." (R. 203.) But the majority of the court, without discussion, concluded that the accumulations were gifts by the petitioner, and that his non-exercise of his power to terminate the trust "was not a release within the intendment of Section 452(c) of the Revenue Act." (R. 204.)

Assignment of Errors

The Circuit Court of Appeals erred:

1. In holding that the value of closely held stock, of which there had been no sales, was properly determined by giving no weight to any factor except the value of the assets held by the corporation in question.

2. In holding that the termination of a power created by another person constituted a gift by the donee of the power.

3. In holding that the termination of a power through failure to exercise it was not a release of the power within § 452(c) of the Revenue Act of 1942.

4. In holding that the Government had sustained the burden of proof which was on it to show that the income in question was subject to the petitioner's power.

Reasons for Granting the Writ

I

The Value of the Piedmont Stock

1. The decision with respect to the value of the Piedmont stock is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Laird* v. *Commissioner,* 85 F. (2d) 598, 600. In the *Laird* case, the Commissioner followed the method which has been approved here. He determined the value of stock for which no market quotations were available by valuing the underlying assets, and dividing the total valuation so obtained by the number of outstanding shares. This valuation was sustained by the Tax Court, but was reversed by the Circuit Court of Appeals. The court said (p. 601):

> This not only ignored the treasury regulations prescribing the method by which stock in close corporations should be valued, but directly violated these regulations. Stock in such a corporation must not be valued "by taking the mean between the highest and lowest quoted selling prices" of the stock constituting the assets of the corporation to determine the worth of the company and then dividing this by the number of shares outstanding . . . Neither the Commissioner nor the Board gave any consideration whatever to the earning and dividend-paying capacity of the Christiana and Delaware stock. Their method was arbitrary and contrary to the regulations.

The decision below is also in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Weber* v. *Rasquin,* 101 F. (2d) 62, and *Commissioner* v. *McCann,* 146 F. (2d) 385, decided by different judges from those who considered the present case.

The decision below is also in direct conflict with the provisions of the applicable Treasury Regulations. The judge of the Tax Court has said that the value of the Piedmont stock can be obtained only "by primarily considering the value of the securities owned by the corporation. Any other approach would, in our opinion, be futile." (R. 61.) This is directly contrary to the Treasury Regulations, which provide (Regulations 79 (1936 ed.) art. 19(1), and 19(3), fifth paragraph):

> The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell.
>
> . . . . . .
>
> If the value of a security cannot be determined by sales, or from bid and asked prices, . . . then . . . the value is to be arrived at . . . in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock.

This language continues without change in the current regulations. Regulations 108, § 86.19(a), and 86.19(c), sixth paragraph. The Regulation gives no warrant for the assertion that "primary" consideration is to be given to net worth. It requires real consideration of the price at which the property would actually "change hands between a willing buyer and a willing seller," and also of "earning power, dividend-paying capacity, and all other relevant factors." To say that to give real and effective consideration to such factors is "futile" is not only wrong as a matter of law, but is a direct denial of the provisions of regulations of more than ordinary authority. Mere lip

service to these factors should not suffice. It is obvious that this error in standard must have affected substantially the conclusion reached by the judge of the Tax Court.

The decision below on this point was without discussion. No reason was given for the inapplicability of the decisions cited above or of the clear provision of the Regulations. The judge who wrote the opinion felt that "there is at least a substantial doubt as to whether the conclusion is based upon proper standards," and favored a remand to the Tax Court. (R. 201-202.)

It is recognized that this Court cannot undertake to make the general evaluation of evidence in valuation cases or in other cases, and that it should not do so if it could. But it does not follow that every valuation case should be cast upon an uncharted sea. This Court does have a function in determining the proper standards of valuation to be applied by the triers of the facts. As it said in *Powers* v. *Commissioner*, 312 U.S. 259, 260, "The question of what criterion should be employed for determining the 'value' of the gifts in question is a question of law."

The *Powers* case furnishes a clear illustration of the effectiveness of this Court's participation in this process. Prior to the *Powers* decision there was great doubt among the lower courts as to the proper standard to be applied in determining the value of an insurance policy for gift tax purposes. This uncertainty was entirely dissolved by the *Powers* decision. The question there at issue no longer has to be decided by courts and by administrative officers, and discrimination between taxpayers has been eliminated.

In the absence of an authoritative guide, valuation decisions become little better than a lottery. The result depends entirely upon the individual before whom the case

chances to come for decision. There is in this, of course, no reflection on the judges. Each does his conscientious best. But without a guide or standard to apply, the decisions become personal decisions, and the greatest divergency in result almost automatically follows. There are many aspects of valuation which ultimately must rest on individual judgment. But that is not true of the question which is presented in this petition. That question is one of the proper standard to be applied generally in cases involving the valuation of closely held stock. The determination of that standard by this Court would go far towards removing uncertainty and confusion in the determination of this question, and towards eliminating fortuitous discrimination among taxpayers which is the inevitable result of that uncertainty and confusion—to the end that we may have so far as humanly possible a government of laws and not of men.

II

Questions as to Gift Tax on Income of 1932 Trusts

2. In 1932, the petitioner's wife created five trusts for her children, giving the petitioner power to terminate the trusts. Nearly all of the income of the trusts was accumulated, and the petitioner did not terminate the trusts. Nevertheless, the tribunals below have held that his continuing failure to exercise the power to terminate amounted to an annual relinquishment of the power with respect to the income of the trusts, and that this annual relinquishment of power constituted a transfer by the petitioner by gift of each year's income.

The decision that the termination of a power over property created by another is a taxable gift is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Solomon*, 124 F. (2d) 86. In

that case, a woman had power to alter or amend a trust which was created (as to the part before the court) by her husband. In 1935 she relinquished or terminated this power. The Commissioner asserted that this termination amounted to a taxable gift. The Circuit Court of Appeals held that this termination of a power *created by another* was not a taxable gift.

In distinguishing *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, and related cases, the court said (124 F. (2d) at 90):

> But it is fundamental in those instances that the person with control over the property was either its owner or donor in the first instance.

To the same effect are the decisions in *Edith Evelyn Clark*, 47 B.T.A. 865, and *Estate of Gertrude Leon Royce*, 46 B.T.A. 1090. These decisions are of more than ordinary importance, because the Commissioner has formally announced his acquiescence in the conclusion reached in both. See 1942-2 Cum. Bull. 4, 16. They thus establish a settled administrative policy which is to be applied to taxpayers generally. That policy should be applied to this taxpayer.

The principle of these cases is directly applicable in the present case. Both the *Solomon* case and the present case involve gift tax liability. The most that the petitioner did here was to terminate a power over property, which is precisely what happened in the *Solomon* case. In the *Solomon* case the power was created by the taxpayer's husband, and that fact was held to be decisive. In the present case, the power was created by the taxpayer's wife. The parallel is thus complete. Only the decisions are divergent.

The basis of the decision of the Tax Court was that it has already been decided that the petitioner's possession of the power in question "made him, for tax purposes, the

owner of the trust property and taxable on its income."[2] (R. 63.) This is reading into the decisions already made with respect to this taxpayer far more than was ever decided there. It is true that the petitioner has been held taxable on the income of the trusts because of the power which was conferred on him. But it is not true that it has been decided that he was the owner of the property. That is simply contrary to the fact. His relationship to the property was that he had a power over it. That power has been held to be enough to make him taxable on the income, because income taxation generally follows power and control. But because the burden of income taxability was thrown on the petitioner does not make it follow that he is "the owner" of the property. To make the decision turn on such an assertion is to assume the point in issue. The fact is that the petitioner's relation to the property was that he had a power over it. The termination of such a power, conferred by another, is not a "transfer . . . of property by gift" for gift tax purposes.

There is strong evidence for this conclusion in the legislative history. The tax is sought to be imposed here under § 501(a) of the Revenue Act of 1932, which prescribed a tax on the "transfer . . . of property by gift." At the same time Congress enacted § 501(c) of the Revenue Act of 1932, as a partial definition of the transfers which were subjected to the tax. Section 501(c) thus amounts to a contemporaneous legislative definition of the scope of § 501(a). Section 501(c) (*infra*, p. 18) provided:

> The tax shall not apply to a transfer of property in trust where the power to revest *in the donor* title to such property is vested *in the donor*, . . . but the re-

[2] The reference is to *Richardson* v. *Commissioner*, 121 F. (2d) 1 (C.C.A. 2d, 1941), affirming, 42 B.T.A. 830, holding that the petitioner was taxable on the income of these trusts.

> linquishment or termination of *such* power (other than by *the donor's* death) shall be considered to be a transfer *by the donor* by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer *by the donor* of such income by gift. (Italics ours.)

Congress thus made it plain that the relinquishment of a power was a transfer of property only when the power had been *reserved* by the person who later relinquished it. The relinquishment of *donated* powers was not made taxable until the enactment of § 1000(c) of the Internal Revenue Code, added by § 452(a) of the Revenue Act of 1942 (*infra*, pp. 19-20). This provision is expressly inapplicable to gifts made before 1943. Revenue Act of 1942, § 451 (*infra*, p. 18). Where Congress has legislated with such particularity with respect to the relinquishment of powers, there is no basis for an extension of the liability so imposed by reliance only on the completely general provisions of the statute. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56.

The basis on which the court below decided does not appear. None of the cases or other material here mentioned was referred to in its opinion. Ignoring the taxpayer's arguments and authorities does not negative the existence of a clear conflict in the decision reached.

3. The decision below with respect to the construction and application of § 452(c) of the Revenue Act of 1942 is in conflict with the plain statements of the Committee Reports of both houses of Congress, and with the administrative interpretation of the statute by the Commissioner in his regulations.

Section 452(c) of the Revenue Act of 1942, as amended,[2] provides that—

> (c) Release on or before July 1, 1946.—
>
> (1) A release of a power to appoint before July 1, 1946, shall not be deemed a transfer of property by the individual possessing such power.
>
> (2) This subsection shall apply to all calendar years prior to 1946 and to that part of the calendar year 1946 prior to July 1, 1946.

(*a*) *Termination by lapse of time is a release.* The Report of the House Committee on Ways and Means on the Revenue Act of 1942 contains a clear legislative definition of what it meant by "release of a power."[3] The term was not confined to formal releases but included specifically a termination of a power through lapse of time. This appears from the following language in the report:

> A release of a power of appointment need not be express or formal in character. For example, the failure to exercise a power of appointment within a specified time, resulting in the termination of a power of appointment, is taxable if other conditions imposed by Section 811(f)(1) are present.

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[2] The most recent amendment is by the Act of June 29, 1945, Public Law 95, 79th Congress. See note 4, p. 20, *infra*.

[3] The power in question is clearly a "power to appoint." See § 86.2(b) of Regulations 108, set out at pp. 24-25, *infra*, particularly the reference to "a donee of a power of appointment who releases the power which he had received from another person," and the illustration: "For example, if a settlor transfers property in trust for the life of his wife with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment . . ." See also House Report No. 2333, 77th Cong., 2d Sess., pp. 160-161; Senate Report No. 1631, 77th Cong., 2d Sess., p. 323.

House Report No. 2333, 77th Congress, 2d Session, p. 161. The same language was repeated without change in the report of the Senate Finance Committee, clearly establishing Senate agreement on the question. See Senate Report No. 1631, 77th Congress, 2d Session, p. 233. Although the final form of the language which now appears as § 452(c) was not adopted until the Conference Committee acted on the Bill, that language was then formulated and enacted by Congress with the clear background of these Committee definitions.

The language of the Committee Reports has been incorporated by the Commissioner in his Regulations. Regulations 108, § 86.2(b), eighth paragraph; see pp. 24-25, *infra*. Congress has five times reenacted the statute since this regulation was issued.

It seems, therefore, to be wholly clear that when Congress used the word "release" it meant to use it broadly, and to make it applicable to any termination of a power through lapse of time. That construction of the word "release" is not merely clearly stated in the Committee Reports, but it is essential to the operation of the new statutory scheme of estate and gift taxation with respect to powers of appointment, which was the occasion for the enactment of § 452(c).

To hold that a termination of a power by lapse of time is not a "release" is therefore contrary to the clear terms of the legislative history and of the Commissioner's regulations.

(*b*) *Sec. 452(c) was intended to make plain that releases of donated powers prior to its enactment were not taxable as gifts.* When the Revenue Act of 1942 was reported to the Senate by the Finance Committee, it carried forward from the House Bill, with modifications, a new provision relating to the estate taxation of powers of appointment;

and express provision was made in § 402(d)(3) of the Bill with respect to powers which the decedent might release before he died. This, however, applied only to the estate tax. The accompanying Committee Report stated that the statute "should not be construed as a limitation upon the application of the existing *gift tax law* with respect to the exercise or release of a power of appointment." (Italics ours.) Senate Report No. 1631, 77th Congress, 2d Session, p. 243. If this form of the statute had stood, the provisions as to release of powers would have had no application to gift taxes.

When the bill went to Conference, however, the provisions as to release were substantially changed, and the present § 452(c) was added to the *gift tax* section. The Report of the Conference Committee expressly states that "Under the House Bill" releases prior to January 1, 1943 "might be held taxable under the existing gift tax statute, *and this amendment accordingly makes it clear that releases made before January 1, 1943, are not taxable under existing law.*" House Report No. 2586, 77th Congress, 2d Session, p. 71 (Amendment No. 418). (Italics ours.) Congress thus excepted from the gift tax *all* releases of powers prior to January 1, 1943, specifically declaring its intention (in the Conference Report) to change the existing law as to gift taxes.

The intention of Congress with respect to § 452(c) is strongly confirmed by the last sentence of § 1000(e) of the Internal Revenue Code (*infra*, pp. 22-23), added by § 502(a) of the Revenue Act of 1943. This language makes express provision so that that section shall not apply to the expiration of power over so-called interim income. The present case likewise involves "interim income"; but it does not involve *reserved* powers which are the subject of § 1000(e). The present case involves a *donated* power covered by § 452(c). There is no provision as to interim income in

§ 452(c). The fact that Congress did add such a provision to § 1000(e) shows that it understood that its terms would apply to the termination of powers over interim income unless it was restricted by the added language. See House Report No. 1079, 78th Congress, 2d Session, pp. 68-69 (*infra*, p. 23). Moreover, in § 1000(e) Congress has referred to a "relinquishment . . . by an exercise or other termination," thus formally declaring that an "other termination" is a form or method of relinquishment, and thus a release.

The court below completely ignored these clear indications of legislative intent. The basis of the court's decision does not appear from its opinion (see R. 204), but it can stand only on the ground that the termination of a power by lapse of time is not a release, or on the ground that a release of a power is taxable despite the clear provision of § 452(c) that it is not. In the presence of authoritative Congressional and administrative action on these questions, the court below was in error in giving the statute a contrary judicial construction. Such an ignoring of the acts of the coordinate branches of the Government warrants the intervention of this Court's supervisory power even more than in the case of a conflict of decisions between lower courts.

III

4. One of the grounds stated by this Court for the issuance of a writ of certiorari in paragraph 5(b) of its Rule 38 is "Where a Circuit Court of Appeals . . . has so far departed from the accepted and usual course of judicial procedure . . . as to call for an exercise of this court's power of supervision." The opinion in this case was written by a judge who did not concur in the judgment reached as to any of the points presented in this petition. The opinion accordingly gives virtually no indication of the reasons leading to the judgment of the majority. It vouchsafes neither to counsel nor to the taxpayer any clear indication of why the case was decided as it was. We recognize that certain cases under certain circumstances must be disposed of summarily, and often with brief opinions, or with no opinion. We see no reason to believe that this is such a case.

Wherefore, it is prayed that the writ of certiorari should be granted.

Respectfully submitted,
ERWIN N. GRISWOLD,
Counsel for the Petitioner.

December, 1945